1989

State of Utah v. Steven Troy Span : Brief of Appellant

Utah Supreme Court

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BRIEF

CKET NO. 890152

IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Respondent, v. STEVEN TROY SPAN, Defendant/Appellant.	Case No. 890152 Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for aggravated arson, a first degree felony, in violation of Utah Code Ann. section 76-6-103, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Respondent, v. STEVEN TROY SPAN, Defendant/Appellant.	:	Case No. 89Ø152 Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for aggravated arson, a first degree felony, in violation of Utah Code Ann. section 76-6-1Ø3, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Utah Code Ann. section 78-2-2(3)(i) (Utah Supreme Court jurisdiction over first degree felony convictions).

STATEMENT OF ISSUES

1. Did the trial court violate Appellant's constitutional rights to due process, equal protection, and an impartial jury and his statutory right to a jury selection free of racial discrimination by allowing the prosecutor's racially motivated exercise of a peremptory challenge?

2. Should this Court allow prosecutors to disobey trial court orders as long as there is sufficient evidence to translate the misconduct into harmless error?

3. Was the evidence sufficient to support Appellant's conviction?

STATUTES AND CONSTITUTIONAL PROVISIONS

Pertinent statutory and constitutional provisions are set forth in the addendum to this brief.

STATEMENT OF THE CASE

On February 16, 1989, a jury convicted Appellant of aggravated arson, a first degree felony violation of Utah Code Ann. section 76-6-1Ø3 (R. 55).

STATEMENT OF FACTS

A. THE FIRE STARTED WHILE APPELLANT WAS AT HOME WITH HIS FATHER.

On November 16, 1988, between 3:12 and 3:2Ø a.m., Brent Van Os and Curt Taylor drove past the 28ØØ South Adams apartment complex and noticed a fire in a second story apartment (T. 136-137, 15Ø). The fire department received a call about the fire at 3:32 a.m. (T. 89). One of the firemen estimated that it took the team approximately five minutes to arrive at the scene of the fire (T. 9Ø, 95). Fire investigator David Meldrum concluded that the fire had burned for a total of fifteen or twenty minutes before the fire department arrived (T. 272).

Appellant's father, Alvin Span, testified that on November 16, 1988, he was at home with his son from 1:ØØ a.m. until 3:15 a.m., when Appellant left in his car to move to Nevada (T. 442-447). Mr. Span saw no fire accelerants in Appellant's possession that night (T. 447).

B. THE CONDITION OF THE APARTMENT INDICATED SEVERAL POSSIBLE SOURCES OF THE FIRE, AND NONE OF THE EVIDENCE POINTED CONCLUSIVELY TO ARSON.

As is discussed in detail in Point III of this brief, the fire investigation in this case was incomplete and inconclusive. There were no accelerant containers or other arson tools found at the scene of the fire (T. 198). There was

conflicting testimony about whether there were pour patterns, and no testimony that any patterns in the apartment indicated intentional burning (T. 201-202, 283, 285). There were numerous possible natural sources of the fire, and many of these were not investigated (T. 111-114, 117, 120-122, 171-172, 192-193, 196, 198-200, 292, 366). There were no signs of forced entry into the burned apartment to which Appellant had no access (T. 100, 239, 204). A man and woman were seen near the fire (T. 218).

C. THE INTERACTIONS BETWEEN APPELLANT AND THE ARSON VICTIM DO NOT SUPPORT THE CONCLUSION THAT APPELLANT STARTED THE FIRE.

The second story apartment that burned was rented to Barbara Lee, the mother of Appellant's child, Falcon (T. 308-310). At the time of the fire, Ms. Lee worked as a cocktail waitress in a topless bar, the Barbed Wire, located at 348 West 500 South in Salt Lake City (T. 311). She worked every night from 6:00 p.m. to 1:00 a.m., while Appellant watched Falcon (T. 311, 368). Ms. Lee frequently had problems with male patrons at work (T. 371).[1]

Ms. Lee rented the new apartment after she and Appellant broke up around November 7, 1988 (T. 309-310). Their decision to break up their four year relationship was mutual, and they went shopping for new apartments together (T. 461). During

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1 Ms. Lee seemed to be having difficulties with other people during this time. In September of 1988, Ms. Lee's next door neighbor, Ronda, punched Ms. Lee in the eye because Ronda thought Ms. Lee had reported Ronda's welfare fraud (T. 369-370). Ronda also followed Ms. Lee around when they were in their cars (T. 373). Ms. Lee claimed that Ronda moved to Idaho prior to the fire (T. 373).

the course of their breakup, Appellant damaged Ms. Lee's car windshield twice, once because she threatened to stop him from seeing his daughter and once because she left before Appellant was finished speaking with her (T. 336-337, 344-346).

On November 16, Ms. Lee spent the day with Appellant, their daughter, Falcon, and Appellant's father (T. 312-313). Appellant and his father were smoking cigarettes in Ms. Lee's apartment on November 16, 1988 (T. 366).

That night, after Ms. Lee went to work, Appellant came into the Wire (the bar in the basement of the Barbed Wire) between 7:30 and 8:00 (T. 318). He asked Ms. Lee if she had any money and asked her to buy him a drink (T. 319). She gave him five dollars and bought him a drink (T. 319). He sat and watched Ms. Lee for about an hour and then left (T. 320).

Randy Brown, a steady customer at the Wire, who had helped Ms. Lee move her belongings into her new apartment, was also at the Wire that night (T. 318). When Mr. Brown left the Wire to go to his truck, Ms. Lee accompanied him outside, and they discovered that his truck had been vandalized (T. 321). Mr. Brown did not look to see if other cars in the Barbed Wire parking lot had been vandalized (T. 380).

Twenty minutes after he left the Wire, Appellant called Ms. Lee (T. 320). Ms. Lee accused Appellant of vandalizing Mr. Brown's car, which accusation he denied (T. 323). About fifteen minutes later, Appellant returned to the Wire (T. 323). When he arrived, he sat next to Mr. Brown and spoke with him for about

fifteen minutes (T. 326). Mr. Brown testified that Appellant asked him if he was Ms. Lee's new boyfriend, and they discussed whether or not Appellant had vandalized Mr. Brown's truck (T. 382). At about 11:ØØ, Appellant went to the parking lot, where he apparently remained until closing at 1:ØØ, at which time he came into the Wire again, but was told the bar was closing (T. 327). The Wire staff left together and went to Denny's, and Mr. Brown went there with Ms. Lee in her car (T. 328). Ms. Lee stayed with Mr. Brown that night, and found out by calling her father the next morning that her apartment had burned (T. 331-333).

After leaving the Wire, Appellant went home to talk with his father, and decided to move to Nevada (T. 442-447). They were together until about 3:15 a.m., at which time the elder Mr. Span left on a truck driving job and Appellant drove off with his car packed to go to Nevada (T. 442-447).

Appellant testified that after leaving his father, he stopped at a gas station and then drove to Ms. Lee's apartment to tell her that in moving back to Las Vegas, he didn't intend to abandon his rights as a father to Falcon, but when he saw the fire, he drove away in a panic (T. 472). He drove to Karen Bateman's apartment (Ms. Bateman was, both before and after the fire, a friend of both Ms. Lee and Appellant) to tell her about how he felt about Ms. Lee's conduct, and that he was moving to Las Vegas (T. 393-395). At trial, Ms. Bateman testified that Appellant told her that Ms. Lee's apartment was in flames (T.

395-399).[2]

While Appellant was in Nevada, Ms. Lee continued to interact with him, and he gave her furniture and other items during that time period (T. 408).

Appellant testified at trial that he did not set Ms. Lee's apartment on fire (T. 477).

SUMMARY OF ARGUMENT

Before the jurors were sworn, Appellant moved to quash the jury, alleging that the prosecutor had used a peremptory challenge to remove the only racial minority panel member (T. 62). The court denied this motion, concluding that Appellant was not timely in raising it, and concluding that Appellant had not proven himself a member of a "cognizable racial group" (T. 65, 69).

Because Appellant raised his objection to the peremptory challenge at the first opportunity outside the presence of the jury and before the jurors were sworn, it was timely under Utah law. Under state and federal constitutional provisions relating to equal protection of the laws, due process

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2 The morning after Ms. Bateman's conversation with Appellant, she was interviewed by fire investigator Brown, who indicated that Ms. Bateman had recited Appellant's previous threats to blow up Ms. Lee's car and burn up her apartment and her father's house, and Ms. Bateman quoted Appellant as having said "I flamed Barbara's apartment." (T. 426).

Ms. Bateman explained at trial that she was unsure of what Appellant had said on the night of the fire because she was drunk that night, adding that regardless of what Appellant said, Ms. Bateman did not think Appellant was responsible for the fire (T. 395, 399). During the interview between Mr. Brown and Ms. Bateman, Ms. Lee was present and repeatedly interrupted and interjected comments (T. 427-428).

of law, and fair trial, and under state and federal jury selection laws, Appellant's race does not preclude him from objecting to the prosecutor's exercise of a peremptory challenge on the basis of race.

During the State's case-in-chief, Appellant moved to prohibit the prosecution from eliciting evidence concerning arson suspects other than Appellant (T. 414-415). Immediately after this motion was granted, the prosecutor elicited the forbidden evidence from the State's witness (T. 414). Appellant moved for a mistrial, which the court denied (T. 415-417).

While the prosecutor's disobedience of the trial court's order constitutes reversible error under conventional prosecutorial misconduct cases, Appellant asks this Court to adopt a standard of automatic reversal in cases such as the instant one involving blatant disobedience of the trial court by the prosecutor.

The evidence in this case does not demonstrate that the fire in Ms. Lee's apartment was caused by arson or by Appellant. Because the State failed to sustain its burden of proving Appellant guilty beyond a reasonable doubt, this Court should reverse Appellant's conviction and declare him innocent as a matter of law.

I.
THE COURT VIOLATED APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL, AND STATE AND FEDERAL JURY SELECTION LAWS BY ALLOWING THE PROSECUTOR'S RACIALLY MOTIVATED EXERCISE OF A PEREMPTORY CHALLENGE.

A. THE PROSECUTOR, USING A PEREMPTORY CHALLENGE, REMOVED THE ONLY NON-CAUCASIAN FROM THE JURY.

Before Appellant's jury was sworn, Appellant moved to quash the jury, alleging that the prosecutor had used his last peremptory challenge to remove the only racial minority member (T. 62). The court denied this motion without evaluating the merits of the claim, concluding that Appellant was not timely in raising it, and concluding that Appellant had not proven himself a member of a "cognizable racial group" (T. 65, 69). The transcript pages covering this issue are included in Appendix 1.

B. APPELLANT'S MOTION TO QUASH THE JURY WAS TIMELY.

After the court's initial indication that Appellant's motion to quash the jury came too late, defense counsel explained that her objection followed the removal of Mr. Phung by minutes, that the challenge removing Mr. Phung was the prosecution's last, and that defense counsel had objected to that challenge at the first opportunity outside the presence of the jury, before they had been sworn (T. 67).

Utah Code Ann. section 78-46-16, which governs challenges to jury selection, provides the following time limits for such challenges:

> (1) Within seven days after the moving party discovered, or by the exercise of diligence could have discovered the grounds therefore, and in any event before the trial jury is sworn to try the case, a party may move to stay the proceedings or to quash an indictment, or for other appropriate relief, on the ground of substantial failure to comply with this act in selecting a grand or

trial jury.[3]
....

This rule is also applied to evaluate the timeliness of constitutional jury selection challenges.[4] Utah Rule of Criminal Procedure 18(c)(ii) also provides that challenges to panels are timely if raised prior to the swearing in of the jurors.

Because Appellant objected to the jury selection process within minutes of the prosecutor's peremptory challenge of Mr. Phung, and before the jury was sworn (T. 69), the objection was timely under Utah law.

C. APPELLANT'S RACE DOES NOT PROTECT THE PROSECUTOR'S ABUSE OF THE PEREMPTORY CHALLENGE FROM SCRUTINY.

The trial court refused to consider Appellant's

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3 The Utah Jury Selection Act contains two provisions concerning Appellant's racial discrimination objection. Utah Code Ann. section 76-46-3 provides:

> A citizen shall not be excluded or exempt from jury service on account of race, color, religion, sex, national origin, or economic status.

Utah Code Ann. section 78-46-2 provides:

> It is the policy of this state that persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this act to be considered for jury service and have the obligation to serve as jurors when summoned for that purpose.

4 See State v. Bankhead, 727 P.2d 216, 217 (Utah 1986)(defendant's challenge to the constitutionality of the jury selection in her case was waived because it was not raised in the trial court before the jury was sworn, as required by section 76-46-16(1)).

allegation that the prosecutor removed Mr. Phung for racial purposes because Appellant, as a caucasian (T. 68), was not a member of a "cognizable racial group" (T. 65). It is true that the cases named specifically during the motion to quash the jury pose as an element of a prima facie case of racial discrimination a showing that the appellant and the jurors stricken by the peremptory challenges share membership in a cognizable racial group.[5]

However, defense counsel argued that the showing of racial identity between a criminal defendant and a juror removed by peremptory challenge is not a mandatory showing, and argued that other cases recognize that an appellant may object to the improper exercise of peremptory challenge by the prosecutor, regardless of the race of the appellant (T. 67).

As is discussed infra, Appellant's rights to equal protection, due process, and to a fair trial under the Utah and United States Constitutions, and his rights under the Utah and United States jury selection laws are not contingent on his race.

1. EQUAL PROTECTION

a. Federal Equal Protection

In State v. Cantu, 750 P.2d 591 (Utah 1988), this Court explained the prima facie showing a defendant must make in order to raise a challenge under Batson v. Kentucky, 476 U.S. 79 (1986):

> To attack a peremptory challenge under

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5 Cantu, 750 P.2d at 595; Batson, 476 U.S. at 96.

> Batson, the defendant must establish a prima facie case by showing (1) that he is a member of a cognizable racial group, (2) that the prosecution exercised peremptory challenges to remove from the panel members of the defendant's race, and (3) that all the relevant facts and circumstances raise an inference that the prosecution used its peremptory challenges to exclude the veniremen from the petit jury on account of their race.

Id. at 595.

Inasmuch as the defendant in Cantu was apparently of the same racial origin as the juror stricken,[6] this Court was not in a position in that case to evaluate whether or not the racial identity factor set forth in Batson is a prerequisite to raising the claim, or merely one mode of proof of racial discrimination.

Appellant urges this Court to examine the analysis provided by State v. Superior Court of Maricopa County, 753 P.2d

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6 The defendant in Cantu was able to meet the first two prongs of the Batson test because he was hispanic and the juror stricken was

> one of two people with Hispanic surnames picked to supplement the jury venire. Although the challenged panel member, Mr. Lopez, was a native-born American and did not respond when the panel was asked if any of them considered themselves a member of a minority group, he did concede that he was of Hispanic ancestry.
> ....
> When asked if he considered himself a member of a minority group, Lopez, a native born American, indicated that he did not. Only when pressed on the point did he concede that his ancestry was Hispanic. There is no indication on the record that Lopez appeared Hispanic or spoke with an accent.

Id. at 596, 597.

1168 (Ariz.App.), affirmed, 760 P.2d 541 (Ariz.), U.S. appeal pending, and to recognize that the racial identity factor is not a prerequisite to raising a claim of racial discrimination under Batson.

In State v. Superior Court (Maricopa County), 753 P.2d 1168 (Ariz. App.), affirmed, 760 P.2d 541 (Ariz.), U.S. appeal pending, the court explored a white defendant's Batson challenge to peremptory challenge removal of two black veniremen. Id. at 1169. Upon the defendant's objection during jury selection, the trial court requested the prosecution to explain the exercise of peremptory challenges removing the two black jurors. Id. The State refused to comply with the trial court's request, and sought special relief from the appellate court, arguing that because the defendant was white and the challenged jurors were black, the defendant had no standing and could not make a prima facie showing under Batson. Id. at 1169-1170.

The appellate court rejected the State's reasoning, explaining that

> [w]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

Id. at 1170-1171, quoting Peters v. Kiff, 407 U.S. 493, at 504 (1972).[7] The Court explained federal caselaw showing that the racial identity requirement in Batson is neither a standing

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7 Peters v. Kiff is discussed in detail in subsection 2 of subsection B of this point.

requirement, nor an essential element to every prima facie case, but is merely one factor among many that might be used to raise an inference of racial discrimination. See id. at 1170-1172. The court concluded that the trial court was acting within its discretion in ordering the State to explain the peremptory challenges of the two black jurors. Id. at 1172.

b. State Uniform Operation of Laws

Regardless of this Court's acceptance of the interpretation of federal standards espoused by the Arizona appellate court in the Maricopa County case, Appellant notes that this Court has yet to define how the Utah State Constitution uniform operation of laws provision applies to claims of racial discrimination in jury selection.

Article I section 24 of the Utah Constitution provides:

> All laws of a general nature shall have uniform operation.

In Malan v. Lewis, 693 P.2d 661 (Utah 1984), this Court explained that while federal precedents interpreting the federal equal protection clause may be persuasive in the interpretation of the state constitutional uniform operation of laws provision, they are not binding - this Court is free to adopt interpretations of the Utah uniform operations of laws provision that provide greater protection than that provided by federal interpretations of the federal equal protection clause. Id. at 670.

In Malan v. Lewis, this Court recognized that uniform operation of the laws is an essential check on the exercise of

government power. Id. at 670. Erecting a "same race" rule for challenges of racist exercises of peremptory challenges can hardly be expected to serve as a check on the exercise of government power. Indeed, the erection of such a rule would facilitate the arbitrary exercise of government power, by allowing even the most blatant cases of racial discrimination to stand unexamined, as long as those cases involve the right racial components (racial disparity between defendant and jurors).

In Peters v. Kiff, in explaining why racial discrimination against black jurors deprives a white defendant of due process of law under the federal constitution, Justices Marshall, Douglas, and Stewart explained the harms caused by racial jury selection,[8]

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that my have unsuspected importance in any case that may be presented.

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8 Justices Marshall, Douglas, and Stewart found that due process forbids racist jury selection, regardless of the race of the criminal defendant. Peters at 494-505. Justices White, Brennan, and Powell concurred in the judgment expressed in the main opinion, noting that federal laws prohibiting racist jury selection reflect the central concern of the Fourteenth Amendment, and should be read as granting standing to the petitioner in Peters. Id. at 505-507. Justices Burger, Blackmun and Rehnquist dissented, arguing that there was no proof of a causal connection between the denial of the petitioner's constitutional rights and his conviction, and noting that the issue was not timely raised. Id. at 507-513.

Id. at 503-504.

The main opinion noted that when racial considerations control jury selection, harms run to the defendant in the case where the discrimination takes place, to all criminal defendants who are deprived by corrupt jury selection systems of a fair cross-section of the community on their juries, and to the excluded jurors, who are denied their right to participate in the justice system and who are stigmatized as a class as being people of lesser quality than those who are allowed to sit on juries. Id. at 499-500.[9]

Appellant urges this Court to protect him, other criminal defendants, and all potential jurors from racial discrimination in the jury selection process by interpreting Article I section 24 of the Utah Constitution as requiring the state to provide a racially neutral explanation for peremptory challenges when the trial court finds that the facts and circumstances of the case raise an inference of racial discrimination. See State v. Superior Court of Maricopa County, 753 P.2d 1168, 1172 (Ariz.App.), affirmed, 760 P.2d 541 (Ariz.), U.S. appeal pending, (quoting Batson v. Kentucky, 476 U.S. at 96-97, "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances.").

2. DUE PROCESS

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9 See also Batson v. Kentucky, 476 U.S. 79, 86-88 (1986) (discussing harms of racial discrimination in jury selection).

a. Federal Due Process

Federal due process forbids racial jury selection, regardless of the race of the defendant on trial. As stated in Peters v. Kiff, 407 U.S. 493 (1972), in the opinion of Justices Marshall, Douglas, and Stewart,

> The crime, and the unconstitutional state action, occur whether the defendant is white or Negro, whether he is acquitted or convicted. In short, when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim.

Id. at 498.

In Peters, the petitioner, a white male who had been convicted of burglary in state court, argued for the first time in a federal habeas corpus following the affirmance of his conviction by the state appellate court that the juries that indicted and convicted him were comprised illegally, as a result of systematic exclusion of blacks from jury service. Id. at 494-495, and n. 1, 3. The state argued that because the petitioner was white, he had suffered no discrimination, but six members of the Supreme Court rejected the state's argument.

The main opinion explains how due process governs jury selection and protects against racist jury selection practices:

> "A fair trial in a fair tribunal is a basic requirement of due process."... [It is] well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law....
>
> Moreover, even if there is no showing of actual bias in the tribunal, this Court

> has held that due process is denied by circumstances that create the likelihood or the appearance of bias....
>
> These principles compel the conclusion that a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

Id. at 501-503 (citations omitted).

As is discussed in subpoint D, it appears that the prosecutor challenged Mr. Phung because of his race. In allowing the prosecutor in the instant case to remove Mr. Phung from the jury because of his race, the trial court violated Appellant's federal right to due process.

b. State Due Process

Article I section 7 of the Utah Constitution provides "No person shall be deprived of life, liberty or property, without due process of law." In interpreting this provision of the Utah Constitution, this Court has described as persuasive federal precedents interpreting the due process clause of the Fourteenth Amendment of the United States Constitution. E.g. Vali Convalescent & Care Inst. v. Industrial Commission, 649 P.2d 33 (Utah 1982). Appellant urges this Court to adopt the reasoning and result of Peters v. Kiff in interpreting Article I section 7 of the Utah Constitution.

As will be shown in subsection D of this point,

Appellant was tried and convicted by a jury selected in an arbitrary and discriminatory manner. Regardless of Appellant's race, in allowing the prosecutor to exercise his peremptory challenge of Mr. Phung in a discriminatory manner, the court jeopardized the deliberative process of Appellant's trial, violated Mr. Phung's right to serve on the jury, sacrificed the integrity of the judicial process, and violated Appellant's right to due process under the Utah Constitution. See Peters v. Kiff, 407 U.S. 493, 498-503 (1972).

3. TRIAL BY AN IMPARTIAL JURY

a. Federal Right to a Fair Trial

A prosecutor's racist exercise of peremptory challenges violates an appellant's federal right to a fair trial, regardless of the race of the appellant. In Booker v. Jabe, 775 F.2d 762 (6th Cir.), cert. denied, 479 U.S. 1046 (1987), the court determined that the systematic racist exclusion of jurors through the exercise of peremptory challenges violates the federal constitutional Sixth Amendment right to an impartial jury, stating:

> Such an abuse distorts the jury's decision-making, undermines the jury's integrity, and denies both the defendant and the public the impartial jury that the Constitution requires.

Id. at 762.

In Booker, two black defendants were convicted by an all-white jury of armed robbery. Id. at 763-764. The jury selection involved multiple racially based peremptory challenges

Id. at 764. Both the trial court and the federal magistrate reviewing the voir dire in habeas corpus proceedings concluded that there was no precedent for prohibiting the use of peremptory challenges for racist purposes. Id. at 764-765.

On appeal, the Sixth Circuit provided a review of Sixth Amendment law pertaining to jury selection, see 775 F.2d 762, 767-770, and concluded that the amendment prohibits the racist exercise of peremptory challenges:

> We conclude that a prosecutor's systematic use of peremptory challenges to excuse members of a cognizable group from a criminal petit jury offends the Sixth Amendment's protection of the defendant's interest in a fair trial and the public's interest in the integrity of judicial process, as well as the prosecutor's special duty as "the servant of the law" to see that "guilt shall not escape or innocence suffer."

Id. at 772 (citations omitted). The Sixth Amendment analysis provided by the Sixth Circuit was in no way contingent on the race of the appellant. The Court recognized that racist exercise of peremptory challenges, by limiting the representation on the jury of a fair cross section of the community, impairs the process of deliberation and destroys public confidence in the integrity of the judicial process. Id. at 770-771.

As will be demonstrated in subsection D of this point, the record in this case raises the inference that was not rebutted that the prosecutor removed Mr. Phung with a peremptory challenge for racist purposes. In allowing the prosecutor's peremptory challenge of Mr. Phung to stand, the trial court violated Appellant's right to an impartial jury under the Sixth

Amendment to the United States Constitution.

b. State Right to an Impartial Jury.

Article I section 12 provides, in part, "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Aside from following federal interpretations of the federal guarantee of an impartial jury, this Court should decide as a matter of state constitutional law that Article I section 12 of the Utah Constitution prohibits arbitrary and discriminatory jury selection such as that occurring in this case.

Appellant refers this Court to state court decisions interpreting state constitutional provisions designed to insure impartial juries through representation of fair cross sections of the community on juries, which decisions have concluded that the racist use of peremptory challenges is impermissible under state constitutional provisions, regardless of the race of the appellant.[10] This Court has already relied on some of these cases in evaluating racial discrimination in the exercise of a peremptory challenge.[11] Appellant requests that this Court adopt a specific interpretation of the Utah Constitution impartial jury

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10 See People v. Wheeler, 583 P.2d 748 (Cal. 1978); State v. Neil, 487 So.2d 481 (Fla. 1984); Com. v. Soares, 387 N.E.2d 499 (Mass.), cert. denied, 444 U.S. 881 (1979); State v. Crespin, 612 P.2d 716 (N.M. 1980).

11 See State v. Cantu, 114 Utah Adv. Rep. 3, 4 (Utah 1989), which cites and discusses State v. Wheeler, 583 P.2d 748 (Cal. 1978); State v. Slappy, 522 So.2d 18, 22 (Fla.), cert. denied, 108 S.Ct. 2873 (1988).

provision, which prohibits racial exercises of peremptory challenges.

4. UTAH AND UNITED STATES JURY SELECTION LAWS

a. Federal Jury Selection Law

Appellant is entitled under federal law to challenge racial discrimination in the selection of his jury, regardless of his race. In Peters v. Kiff, 407 U.S. 493 (1972), Justices Marshall, Douglas, and Stewart concluded that standing of the petitioner to object to the racist jury selection involved in that case was assured by 18 U.S.C. section 243, which provides:

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude...

Id. at 504-505. This statute was also mentioned as a basis for the petitioner's standing by concurring justices White, Brennan, and Powell. Id. at 505-507.

b. State Jury Selection Laws

The policy governing jury selection in Utah is expressed in Utah Code Ann. section 78-46-2:

> It is the policy of this state that persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this act to be considered for jury service and have the obligation to serve as jurors when summoned for that purpose.

More specifically, Utah Code Ann. section 76-46-3 prohibits

racial discrimination in jury selection in all cases, regardless of the race of the litigants:

> A citizen shall not be excluded or exempt from jury service on account of race, color, religion, sex, national origin, or economic status.

Utah Code Ann. section 78-46-16, which governs claims under the Utah Jury Selection Act, poses as a prerequisite to correction of violations under the act a finding of actual prejudice. As explained in the main opinion in Peters v. Kiff, the dangers posed by racist jury selection, while difficult to prove, are of such gravity that prejudice is effectively presumed in these cases. See id. at 504.

In denying Appellant the benefits due him under state and federal jury selection laws because of Appellant's race, the trial court violated the state and federal jury selection laws, and this error should be presumed prejudicial.

D. THE RECORD OF THE VOIR DIRE DEMONSTRATES THAT THE PROSECUTOR EXERCISED HIS PEREMPTORY CHALLENGE OF MR. PHUNG IN A RACIALLY DISCRIMINATORY MANNER.

In State v. Cantu, 114 Utah Adv. Rep. 3 (Utah 1989), this Court vacated the appellant's conviction after finding that the prosecutor's exercise of a peremptory challenge was indirectly motivated by race. Id. at 4. While the claim of improper exercise of peremptory challenge was originally raised under Batson v. Kentucky, 476 U.S. 79 (1986) as a federal equal protection case, after remand, this Court referred to State v. Wheeler, 583 P.2d 748 (Cal. 1978), a case decided under a state constitutional fair trial provision, for the elements of a prima

facie case of racial discrimination in the exercise of peremptory challenges:

> California courts, for example, require that the issue of group-biased peremptory challenges be raised in a timely manner and that the complaining party make a prima facie case of bias. The elements necessary to such a prima facie case include (1) as complete a record as possible, (2) a showing that persons excluded belong to a cognizable group under the representative cross-section rule, and (3) a showing that there exists "a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." People v. Wheeler, 22 Cal. 3d 280, 281, 148 Cal. Rptr. 890, 905, 583 P.2d 748, 764 (1978).

Cantu at 4.

This court quoted a case from Florida, another jurisdiction which decides cases of racially motivated peremptory challenges under the state constitution fair trial provision,[12] in explaining the factors to be considered in evaluating the state's racially neutral explanation for the peremptory challenge:

> "We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had

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12 See State v. Neil, 457 So.2d 481 (Fla. 1984)(the controlling opinion cited in Slappy v. State, 503 So.2d 350 (Fla.App.3 Dist. 1987); and State v. Slappy, 522 So.2d 18 (Fla. 1988); which opinion provides that racist peremptory challenges violate the state constitutional provision concerning impartial jurors).

> questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror [sic] not challenged." State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988)[cert. denied, cert. denied, 108 S.Ct. 2873 (1988)]...

Id.

In Cantu, this Court did not apply these tests element by element, but apparently surveyed all the relevant facts and concluded that the defendant had made a prima facie showing of discriminatory peremptory challenge, which the prosecution failed to rebut:

> In the transcript of the proceedings below, the prosecutor asked no questions during the initial voir dire examination, and when the supplemental jurors were introduced, the prosecutor asked only one question before exercising his first and only peremptory challenge of the entire voir dire process. The question was both desultory and insufficient to establish any specific bias on the part of the jurors. "I don't know if you asked this, Judge. I would ask you to inquire of either of these two folks whether or not any of their friends or families have been similarly charged. I don't know if you did."

The facts and circumstances of the instant case both raise the inference that the prosecutor challenged Mr. Phung because of Mr. Phung's race, and indicate that the prosecutor's explanation of the challenge fails to rebut the inference.[13]

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13 See State v. Cantu, 750 P.2d 591, 596 (Utah 1988)("In applying Batson, we will examine the record to determine if all the 'facts and circumstances' raise the inference that the prosecution used its peremptory challenges in a racially discriminatory manner. While we recognize that the trial court

The entire examination of Mr. Phung proceeded as follows:

> My name is Viet Phung. My wife's name is Tontee Wen (phonetic). We living at 2332 West between 3332 West and Hope Lane. And I work for a supermarket, Dan's. My wife work for American Express Corporation. I'm been in the -- the first time I've been in court. I have a three children: 18, 15, and 9. And I graduate from high school in Viet Nam.
>
> THE COURT: How long have you been a citizen?
>
> MR. PHUNG: I've been a citizen for about, let's see, nine years.
>
> THE COURT: This is your first experience in court?
>
> MR. PHUNG: Yes.

(T. 19).

The examination revealed no inability of Mr. Phung to serve as an unbiased juror, and the prosecutor made no effort to delve further into Mr. Phung's background or perspective. The prosecutor's only contribution to the voir dire was asking the court to ask all of the jurors about their ability to evaluate testimony from police officers and their ability to evaluate circumstantial evidence (T. 35-36), and asking juror Damewood about how his employment by the sheriff's office would influence his performance as a juror (T. 44-45).

Most of the characteristics revealed about Mr. Phung were shared by most of the jurors, and the characteristics of the other jurors stricken by the prosecutor do not reflect a

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may be in a better position to make that determination initially, an evidentiary hearing held after remand could not recreate all the 'facts and circumstances' as they existed at the time the challenge was made.")

correlation between Mr. Phung's characteristics (unrelated to his race) and the prosecutor's exercise of the other three peremptory challenges.[14]

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14 The state's other peremptory challenges struck Ivan Wright, Carleen Hatch and Robin Oliver (R. 56-57).

Nineteen of the twenty other jurors had been married, and one of the jurors stricken by the state was not married. Married jurors: Collette Stone (T. 13); Cheryl Andrews (T. 14); Joyce Bishop (T. 15); Linda Miller (T. 17); Robin Oliver (T. 18); Michael Brown (T. 20); Keo Sorenson (T. 22); James Allfrey (T. 23); Jennifer Stout (T. 23); Suzanne Parkin (T. 24); Idonna Babcock (T. 25); Carleen Hatch (T. 25); Marion Pettey (T. 26); Robert Curtis (T. 27); Robert Damewood (T. 28); Joyce Kirkham (T. 29); Thomas Cain (T. 30); Janet Fristrup (T. 31); George Young (T. 31).

At least seventeen of the twenty other jurors had children, and one of the jurors stricken by the state had no children. Parent jurors: Collette Stone (T. 13); Cheryl Andrews (T. 15); Joyce Bishop (T. 16); Linda Miller (T. 17); Robin Oliver (T. 18); Michael Brown (T. 20); Keo Sorenson (T. 22); James Allfrey (T. 23); Jennifer Stout (T. 23); Suzanne Parkin (T. 24); Idonna Babcock (T. 25); Carleen Hatch (T. 26); Marion Pettey (T. 27); Robert Curtis (T. 27); Robert Damewood (T. 28); Joyce Kirkham (T. 29); Janet Fristrup (T. 31). George Young was not asked if he had children (T. 31).

Eighteen of the twenty other jurors were employed. Only Jennifer Stout (T. 23) and Idonna Babcock (T. 25) were not employed.

Fourteen of the twenty other jurors had spouses employed outside the home, and two of the jurors stricken by the state did not have a spouse working outside the home. Jurors with spouses employed outside the home: Collette Stone (T. 13); Cheryl Andrews (T. 14); Joyce Bishop (15); Linda Miller (T. 17); Robin Oliver (T. 19); Michael Brown (T. 20); Keo Sorenson (T. 22); James Allfrey (T. 23); Jennifer Stout (T. 23); Suzanne Parkin (T. 24); Idonna Babcock (T. 25); Thomas Cain (T. 31); Janet Fristrup (T. 31); George Young (T. 31).

Thirteen of the twenty other jurors had no prior court experience. Inexperienced jurors: Collette Stone (T. 114); Cheryl Andrews (T. 15); Linda Miller (T. 18); Robin Oliver (T .18); Keo Sorenson (T. 22); Jennifer Stout (T. 24); Idonna Babcock (T. 25); Carleen Hatch (T. 26); Marion Pettey (T. 27); Robert Curtis (T. 27); Ivan Wright (T. 28); Thomas Cain (T. 31); Janet Fristrup (T. 31).

Seven of the twenty other jurors were high school graduates, three of them did not complete high school, four of them had graduated from college, four of them had some education beyond high school, and two jurors' levels of education were not

These facts constitute a prima facie showing that the prosecutor's exercise of the peremptory challenge of Mr. Phung was racially discriminatory.

In Cantu, this Court explained that once such a prima facie case is made, the prosecutor must provide a race-neutral reason to justify to the peremptory challenge, which relates to the juror or the case. Id. at 4. In this case, the prosecutor offered only a general explanation of his methods of exercising peremptory challenges, which neither related to Mr. Phung or to this case. See Appendix 1 (T. 63-65).

Because the prosecutor's explanation for removing Mr. Phung with a peremptory challenge was not specific to the case or to Mr. Phung, it failed to rebut Appellant's prima facie showing that the peremptory challenge was exercised in a racially discriminatory manner. Appellant is entitled to a new trial. Cantu at 4.

This Court may conclude that the trial court's mode of disposing of Appellant's objection on the grounds of waiver and

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discussed. High school graduates: Collette Stone (T. 14); Keo Sorenson (T. 22); Jennifer Stout (T. 24); Suzanne Parkin (T. 25); Idonna Babcock (T. 25); George Young (T. 31); Ivan Wright (T. 28). Less than high school education: Robin Oliver (T. 18); Carleen Hatch (T. 26); Marion Pettey (T. 27). College graduates: Linda Miller (T. 17); Michael Brown (T. 2Ø); Robert Curtis (T. 27); Thomas Cain (T. 3Ø). Some education beyond high school: Cheryl Andrews (T. 14); Joyce Bishop (T. 15); Robert Damewood (T. 28); Janet Fristrup (T. 31). Education level not identified: James Allfrey (T. 23); Joyce Kirkham (T. 29).

One of the other jurors, James Allfrey, worked for a grocery store, and he was not stricken by the prosecutor (T. 23).

Mr. Phung was the only juror asked by the court to disclose how long he had been a citizen of the United States (T. 19).

lack of racial qualification to object, failed to afford the prosecution an adequate opportunity to rebut the prima facie case of racial discrimination. In this event, this Court should remand this case instructing the trial court that Appellant has raised a prima facie case of racial discrimination, and ordering the trial court to evaluate the prosecution's efforts at rebutting the prima facie case.[15]

II.
THIS COURT SHOULD DETER INTENTIONAL PROSECUTORIAL MISCONDUCT BY REVERSING APPELLANT'S CONVICTION WITHOUT ENGAGING IN HARMLESS ERROR ANALYSIS.

A. THE PROSECUTOR INTRODUCED EVIDENCE PREVIOUSLY EXCLUDED BY THE TRIAL COURT.

During the State's case in chief, the prosecutor called Grant Hodson, the landlord over the apartment complex on Adams and 28th (T. 411-412). It was the prosecutor's intent to show that Mr. Hodson had no motive to burn his own property (T. 412-413). Defense counsel objected to this line of questioning, the court sustained the objections, and held a bench conference (T. 413). After the bench conference, the prosecutor continued his direct examination of Mr. Hodson as follows:

Q. Have you suffered as a result of that

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15 See State v. Cantu, 750 P.2d 591, 598 (Utah 1988) (concurring opinion of Zimmerman, J., joined by Durham, J.)("On remand, I would direct the trial court to consider the defendant to have met his burden. Because neither Batson nor Griffith v. Kentucky, ___ U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), which made Batson retroactive, id. 107 S.Ct. at 710, 716, had been decided at the time of the trial, the prosecutor should be given an opportunity to rebut the inference. Once this is done, the trial judge can proceed to rule on the question under Batson.").

fire?
A. Excuse me, what?
Q. Yes or no, have you suffered as a result of that fire?
A. Yes.
Q. Did you start the fire?
A. No.
MS. WELLS: Objection, your Honor.
THE COURT: Sustained. It may be stricken. Your are to disregard it.

(T. 414).

Out of the presence of the jury, defense counsel moved for a mistrial because the prosecutor had just violated the court's bench conference ruling that the State not introduce evidence as to whether or not Mr. Hodson started the fire (T. 414-415). Despite the court's previous ruling prohibiting the introduction of this evidence (the ruling was apparently based on Rule of Evidence 4Ø3 (T. 417-418)), the court denied the motion for a mistrial, concluding that striking the testimony was an adequate remedy (T. 417). The transcript of this portion of the trial is provided in Appendix 2.

By referring to Appendix 2, this Court can see that initially, the prosecutor made no claim of misunderstanding the court's bench ruling excluding the evidence. Rather, the prosecutor took issue with the ruling (T. 416-417). The court then indicated for the second time that the prosecutor had violated the court's order, and the prosecutor apologized, claiming for the first time that he had misunderstood the court's order (T. 419).

B. THIS COURT SHOULD DETER INTENTIONAL PROSECUTORIAL MISCONDUCT BY ORDERING A NEW TRIAL WITHOUT ENGAGING IN HARMLESS ERROR ANALYSIS.

In State v. Ubaldi, 462 A.2d 1001 (Conn. 1983), cert. denied, 464 U.S. 916 (1983), the Connecticut Supreme Court, reviewing similar prosecutorial disregard for trial court rulings, created a new standard designed to deter such conduct:

> Where a prosecutor in argument interjects remarks deliberately intended to undermine the rulings of the trial court to the prejudice of the defendant, his conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal.

Id. at 1011.

The court explained its refusal to apply a harmless error analysis to the case:

> The ultimate implication of this argument is that a state's attorney may choose deliberately to ignore any trial court ruling just as long as the state has amassed overwhelming evidence of a defendant's guilt and the state's attorney's misconduct relates only to a portion of that evidence. We decline to place such a restraint on the ability of this court to defend the integrity of the judicial system.

Id. at 1007.

The Ubaldi court recognized that the United States Constitution does not mandate the reversal of a conviction unless an appellant can demonstrate that prosecutorial misconduct prejudiced his case, id. at 1007-1008, and proceeded to set the reversal standard in cases of intentional prosecutorial misconduct based on the court's supervisory authority over the administration of justice. Id. at 1008-1009.

The court recognized the remedies and rationales

utilized in other states in cases of prosecutorial misconduct, and explained why the court was not satisfied with those remedies:

> Some tribunals have declined to use such supervisory power on the theory that society should not bear the burden of a new trial because of prosecutorial misconduct where a new trial is not constitutionally mandated.[16] According to some authorities, the evil of overzealous prosecutors is more appropriately combatted through contempt sanctions, disciplinary boards or other means. This court, however, has long been of the view that it is ultimately responsible for the enforcement of court rules in prosecutorial misconduct cases. Upsetting a criminal conviction is a drastic step, but it is the only feasible deterrent to flagrant prosecutorial misconduct in defiance of a trial court ruling.

Id. at 1009.

The court continued to explain why a meaningful response from the court was essential:

> We are mindful of the sage admonition that appellate rebuke without reversal ignores the reality of the adversary system of justice. "The deprecatory words we use in our opinions ... are purely ceremonial.' Government

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16 See State v. Hodges, 517 P.2d 1322 (Utah 1974), a case which did not involve intentional disobedience of a trial court order, but involved asking an improper question, in which the court stated,

> Nevertheless, the processes of justice should not be distorted simply for the purpose of censuring a mistake. [Reminiscent of Justice Cardozo's classic remark that: "a felon should not go free because a constable has blundered."] The critical inquiry should be whether there is a reasonable likelihood that the incident so prejudiced the jury that in its absence there might have been a different result.

Id. at 1324 (bracketed portion footnoted in opinion).

> counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice [of verbal criticism without judicial action] - recalling the bitter tear shed by the Walrus as he ate the oysters - breeds a deplorably cynical attitude towards the judiciary." Moreover, "[d]eliberate prosecutorial misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system."

Id. at 1009 (citations omitted, brackets by the court).

The court recognized that the exercise of its supervisory powers in erecting the new rule first required consideration of competing social values such as the trauma imposed on the victim by reprosecution, and the ability of the state to reprosecute. id. at 1009. The court found that the victim, the city of Waterbury, would not be traumatized be a new trial, and found that the rules of evidence would facilitate the State's ability to retry the case. Id.

Appellant requests this Court to exercise its supervisory authority over the administration of the judicial system to deter intentional prosecutorial misconduct such as that which occurred in this case, by adopting a reversal standard like that adopted by the Ubaldi court.

The victim in this case has had voluntary interactions with Appellant since the fire (T. 370-371, 402, 476-477), indicating that the potential trauma that might be imposed on her by a new trial is limited. Presumably, the State would also be

able to reprosecute the case. While the costs which might be imposed by a retrial of this case are significant, the benefits to be gained by this Court's enforcement of minimal standards of prosecutorial conduct are essential to safeguarding the dignity of the trial courts and the quality of criminal prosecutions.

This Court has previously addressed the standards of performance which characterize prosecutors:

> We have previously stated that the State while charged with vigorously enforcing the laws "has a duty to not only secure appropriate convictions, but an even higher duty to see that justice is done." In his role as the State's representative in criminal matters, the prosecutor, therefore, must not only attempt to win cases, but must see that justice is done. Thus, while he should prosecute with earnestness and vigor, it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every means to bring about a just one.

Walker v. State, 624 P.2d 687, 691 (Utah 1981).

The Utah Rules of Professional Conduct also indicate that prosecutors are expected to conduct themselves in an ethical and decorous manner. Rule of Professional Conduct 3.8 provides, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Rule of Professional Conduct 3.4 provides in part, "A lawyer shall not ... (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;... (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,...".

In introducing the excluded evidence in this case immediately after the evidence was excluded, in arguing against the court's ruling after introducing the evidence, and in claiming as a last resort that he didn't understand the bench ruling, the prosecutor failed to meet the basic standards of prosecutorial conduct.

The application of harmless error analysis in this case would effectively condone this kind of conduct in all cases in which the prosecutor considers the evidence of guilt strong. Such condonation would dilute the ethical quality of the role of prosecutor and the power of the trial courts, and would render the criminal trial process into bedlam. Appellant urges that this Court's reversal of Appellant's conviction solely on the basis of the prosecutor's blatant disregard of the trial court's order will not only rectify the harm done to Appellant in this case, but will also protect the order and dignity necessary for the administration of justice in our jurisdiction.

C. UNDER TRADITIONAL PROSECUTORIAL MISCONDUCT ANALYSIS, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL.

In the event that this Court declines to adopt an automatic reversal standard in cases involving prosecutorial disobedience of trial court orders, Appellant asserts that under traditional analysis, the trial court abused its discretion in denying Appellant's motion for a mistrial based on the

prosecutor's misconduct.[17]

In State v. Wiswell, 639 P.2d 146 (Utah 1981), apparently the only Utah case dealing with prosecutorial disregard and disobedience of court orders, the prosecutor repeatedly raised the appellant's failure to testify after the trial court repeatedly sustained objections to the admission of such evidence. Id. at 147. After concluding that the prosecutor's conduct violated the appellant's right to remain silent, this Court found reversible error, stating:

> The references to defendant's silence are fundamental error, which could have affected the result and are therefore prejudicial.

Id. at 147 (citations omitted).

The standard for evaluating prosecutorial misconduct in general prosecutorial misconduct cases appears to be more stringent than that applied in Wiswell (a case distinguished from the general cases by contumacious disobedience by the prosecutor). The general standard is described in State v. Tucker, 727 P.2d 185 (Utah 1986):

> This Court has adopted a two-part test for determining whether a prosecutor's remark warrants reversal: (1) did the remarks call to the attention of the jurors matters which they could not properly consider in determining their verdict, and (2) were the jurors under the circumstances of the particular case probably influenced by those remarks.

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17 The standard of review of this issue is the abuse of discretion standard. State v. Hodges, 517 P.2d 1322 (Utah 1974).

Id. at 187 (citations omitted, emphasis added).

Appellant urges that the less stringent Wiswell possible affect standard should apply in cases of intentional disobedience by the prosecutor.[18] However, for purposes of argument, Appellant is able to show under the more stringent Tucker probable influence standard that reversal is appropriate in this case.

1. THE PROSECUTOR CALLED TO THE ATTENTION OF THE JURORS A MATTER WHICH THEY COULD NOT PROPERLY CONSIDER IN DETERMINING THEIR VERDICT.

During the dispute surrounding the admission of the excluded evidence, the court explained that the court chose to exclude the evidence, apparently on the basis of Utah Rule of Evidence 403 (T. 417-418 (Appendix 2)).[19]

The admission of evidence under Rule 403 is a matter within the sound discretion of the trial court. State v. Larson, 109 Utah Adv. Rep. 23, 25 (Utah 1989). In choosing to elevate the exercise of his own discretion over that of the trial court by introducing the excluded evidence, the prosecutor called to

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18 See State v. Walker, 624 P.2d 687, 691 (Utah 1981)(applying a less stringent "could have affected" threshold of prejudice to cases in which prosecutors knowingly use false testimony or foster false impressions).

19 Utah Rule of Evidence 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

the attention of the jurors a matter which they could not properly consider in determining their verdict.

The court's decision to exclude the evidence concerning the elimination of other possible suspects is further supported by reference to State v. Rammel, 721 P.2d 498 (Utah 1986), in which this Court explained the impropriety of trying to prove an assertion through statistical probability evidence.[20]

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20 In Rammel, a witness named Dyson testified under a grant of immunity to his and the Appellant's involvement in a robbery. Id. at 499. When initially confronted about the crime, Dyson denied any knowledge about or participation in the robbery, but later confessed. Id. at 499. The trial court admitted the testimony of an Officer Welti, which indicated that most people who eventually confess to the commission of crimes initially lie to police officers about the crimes. Id. at 500. Apparently, the prosecution was attempting to show with this evidence that Dyson's initial denial of involvement of the crime was normal, and supported the credibility of his later confession. Id. at 500.

After discussing the impropriety of admitting this testimony under evidentiary rules relating to impeachment of witnesses and foundation for expert testimony, this Court explained that the prosecution should not ask jurors to base their conclusions in a specific case on evidence of probabilities based on what happened in other cases, but should encourage jurors to focus on the evidence pertinent to the specific case before them. This Court stated:

> Finally, even if the testimony was proper impeachment evidence, it should have been excluded because its potential for prejudice substantially outweighed its probative value. In this case, the prosecution attempted to establish, in effect, that there was a high statistical probability that Dyson lied. Even where statistically valid probability evidence has been presented - and Welti's testimony hardly qualifies as such - courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies. Probabilities cannot conclusively establish that a single event did or did not

In the instant case, the prosecutor improperly asked Appellant's jurors to reason that Appellant was guilty because the exclusion of the another person with a possible motive to start the fire made Appellant's guilt more probable. The trial court acted properly in excluding this evidence, and in introducing it, the prosecutor called to the attention of the jurors a matter which was not properly considered.[21]

2. UNDER THE CIRCUMSTANCES OF THIS CASE, THE JURORS WERE PROBABLY INFLUENCED BY THOSE REMARKS.

In State v. Troy, 688 P.2d 487 (Utah 1984), the appellant was convicted of aggravated arson and insurance fraud in a jury trial during which the prosecutor's conduct was improper. Id. at 485. The prosecutor informed the jurors that the appellant had gone by a different name in the past, that the appellant was a witness under the protection of the federal government, that the appellant had been represented in other criminal proceedings. Id. at 485. The prosecutor also compared the appellant's behavior to that of John Hinckley, and asked the jurors to consider their personal experiences in reaching their

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> occur and are particularly inappropriate when used to establish facts "not susceptible to quantitative analysis," such as whether a particular individual is telling the truth at any given time.

Id. at 501 (citations omitted).

21 See also State v. Sinclair, 389 P.2d 465, 470 (Utah 1964)(Court did not err in precluding question concerning whether accomplice was also charged with the crime because "[o]rdinarily whether someone else has been charged with the instant offense is indeed immaterial to the issue to the guilt or innocence of the defendant who is on trial. The issue of concern here was not [the accomplice's] guilt or innocence but the defendant's.").

verdict. Id. at 485, 486.

After concluding that the prosecutor had called to the attention of the jurors matters which were not properly to be considered, this Court concluded that the prosecutor's misconduct mandated a new trial. Id. at 487. The facts of the case provided in the opinion indicate that Troy involved a fire involving natural gas and accelerants ("probably gasoline") in a dwelling owned by the appellant and his ex-wife. The state alleged that the appellant's motive was his desire to obtain insurance proceeds because he was in financial straights. The appellant visited the burned home on the day of the fire, and a large can of gasoline was found in his car. Testimony indicated that the appellant was working during the fire. Id. at 484.

While the comments made by the prosecutor in Troy merely expressed the prosecutor's view that the appellant was a person who had engaged in some unsavory activities in general, the evidence introduced by the prosecutor in this case attempted to demonstrate an increased probability that appellant started the fire at issue in this case, by excluding another possible suspect. Thus, the evidence the prosecutor introduced in this case had a more harmful impact than that in Troy.

The entirely circumstantial evidence against Appellant in the instant case is weaker than that presented in Troy. Review of the statement of facts indicates that the jurors could have concluded that the fire was caused by a cigarette, by accelerants in the apartment below Ms. Lee's, or by accelerants

in the air conditioner or those inherent in the carpeting, by the gas log, or by some combination of these things. Appellant was with his father at the time the fire began, and there was no gas or other accelerant seen or found in Appellant's possession. In these circumstances, it is appropriate for this Court to once again conclude that the misconduct of the prosecutor calls for reversal of Appellant's conviction because "there was not compelling proof of defendant's guilt. The jury could have found either way." Troy at 487.

III.
THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.

Utah Code Ann. section 76-6-1Ø3 defines aggravated arson as follows:

> (1) A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:
> (a) a habitable structure; or
> (b) any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.
> (2) Aggravated arson is a felony of the first degree.

Appellant contends that there is insufficient evidence that arson was committed, or that he committed it. The standard of review of such a claim of insufficiency of the evidence was explained in State v. Tanner, 675 P.2d 539 (Utah 1983). The Court said:

> In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the verdict and will interfere only when the evidence is so lacking and insubstantial that a reasonable person could not possibly have

reached a verdict beyond a reasonable doubt. Id. at 550. If the evidence is sufficiently inconclusive or inherently improbable, this Court must reverse Appellant's conviction. State v. Petree, 659 P.2d 443, 444 (Utah 1983).

Particularly after comparing the instant case with other arson cases, this Court should conclude that there was no conclusive evidence that the fire was caused by arson, or by Appellant.

Fire investigators found no accelerant containers or other modes of starting a fire in or near the apartment (T. 198). Ms. Lee's apartment was full of natural fire hazards - it had just been cleaned (T. 364) (cleaning agents contain hydrocarbons (T. 120-122)), the gas log was on and tipped over (T. 171-172, 192), the carpeting was composed of hydrocarbons (T. 111-114, 117), and people were smoking cigarettes in the apartment on the day of the fire (T. 366). Possible natural fire sources such as the air conditioner (T. 192-193, 196), clothing on the floor (T. 199-200, 292), and apartment full of cleaning materials directly below the burned apartment were not investigated for hydrocarbon content (T. 198-199).[22]

The State presented inconsistent testimony about

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22 Compare State v. Showaker, 721 P.2d 892, 892 (Utah 1986)(evidence of arson sufficient; large drums of fire accelerants were moved into the burned structure, and intentionally poured); State v. Nickles, 728 P.2d 123, 126 (Utah 1986)(evidence of arson sufficient; defendants had a large quantity of acetone, a fire accelerant, in their home, and acetone-soaked suitcases and a device for igniting the fire were found in the home after the fire).

whether or not there were pour patterns in the apartment (T. 201-202; 283), and the investigator pointing out what he considered pour patterns testified that there was no conclusive proof that the patterns were caused by someone intentionally pouring flammable liquids (T. 284-285).[23]

Ms. Lee testified that she was the only one with a full set of keys to the apartment she left locked on the day of the fire (T. 355, 363-364). The windows to the apartment blew out from the heat of the fire (as opposed to falling inward during a break-in)(T. 100, 239), and the dead bolt and other lock to the only door to the apartment were found in a locked position after Mr. Van Os and Mr. Taylor pushed the door in during their rescue efforts (T. 204, 138-139, 219).[24]

There was no physical evidence that Appellant started the fire in Ms. Lee's apartment.[25] Appellant and his father indicated that Appellant was at home with his father at the time the fire started (T. 442-447).[26] Appellant had no keys to Ms.

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23 Compare State v. Showaker, 721 P.2d 892, 892 (Utah 1986)(evidence of arson sufficient; pour patterns were linked with trails of paper towels); State v. Nickles, 728 P.2d 123, 126 (Utah 1986)(evidence of arson sufficient; pour patterns and "trailers" between them were found in the burned home).

24 Compare State v. Showaker, 721 P.2d 892, 892 (Utah 1986)(evidence of arson sufficient; back door to burned structure was forced open).

25 Compare State v. Showaker, 721 P.2d 892, 892 (Utah 1986)(evidence of arson sufficient; defendant's prints found on accelerant container outside burned structure).

26 Compare State v. Troy, 688 P.2d 483, 485 (Utah 1984)(evidence of arson inconclusive; defendant was at work when the fire started); State v. Showaker, 721 P.2d 892, 893 (Utah

Lee's apartment (T. 355, 363-364)[27] and was not seen with any fire accelerants (T. 447).[28]

The conversation between Appellant and Karen Bateman on the night of the fire was unclear. Appellant either told Ms. Bateman that Ms. Lee's apartment was in flames or that he flamed Ms. Lee's apartment (T. 394-395, 426). While the clarification of that statement was crucial to the prosecution, the clarification was impossible because Ms. Bateman was drunk when Appellant came over at approximately 3:30 a.m. on the night of the fire (T. 395, 399), and because Ms. Bateman was interviewed by the fire investigator on the morning of the fire, while her friend, the victim, Ms. Lee, was present and repeatedly interrupting the interview (T. 427-428, 430).[29] Particularly in light of the physical evidence in this case, which indicates that Appellant had no mode of access to Ms. Lee's apartment, and which

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1986)(evidence of arson sufficient; defendant's alibi, even if true, did not preclude the possibility that he started the fire).

27 Compare State v. Troy, 688 P.2d 483, 485 (Utah 1984)(evidence of arson inconclusive - defendant maintained the burned home, and was inside it almost daily and on the day of the fire); State v. Nickles, 728 P.2d 123, 125 (Utah 1986)(defendants burned their own home, to which they had access).

28 Compare State v. Troy, 688 P.2d 483, 485 (Utah 1984)(evidence of arson inconclusive; defendant in possession of large can of gasoline, the probable fire accelerant used in the fire); State v. Nickles, 728 P.2d 123, 126 (Utah 1986)(defendant told her neighbor she had acetone, a fire accelerant, by the barrelful).

29 Compare State v. Showaker, 721 P.2d 892, 893 (Utah 1986)(evidence of arson sufficient; modus operandi of starting fire fit description of what defendant told his co-worker he would do if he were fired).

does not prove that the fire was caused by arson, the Court should not allow Appellant's conviction to stand on one of Ms. Bateman's two versions of what Appellant said on the night of the fire.

Because the State failed to present proof beyond a reasonable doubt that the fire in Ms. Lee's apartment was caused by arson, or specifically by Appellant, Appellant's conviction should be reversed and this Court should declare him innocent as a matter of law. State v. Murphy, 617 P.2d 399, 403 (Utah 1980).

CONCLUSION

This Court should reverse Appellant's conviction and bar his retrial. In the event that this Court finds that there was sufficient evidence to sustain the conviction, this Court should reverse Appellant's conviction on either or both of the grounds articulated in Points I and II, and remand this case for a new trial.

Respectfully submitted this 22 day of September, 1989.

Dan Wells for
BROOKE C. WELLS
Attorney for Appellant

ELIZABETH HOLBROOK
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that 10 copies of the foregoing will be delivered to the Utah Supreme Court and

that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, 84114, this 22 day of September, 1989.

ELIZABETH HOLBROOK

DELIVERED by _____ this ____ day of _____, 1989.

_____

APPENDIX 1

accounted for, Bailiff?

THE BAILIFF: Yes, sir.

THE COURT: And the defendant is present. Where is the jury list?

At this point, the attorneys get to execise what we call preemptory challenges.

(Preemptory challenges made.)

(Jury admonished & noon recess.)

(Noon Recess.)

THE COURT: The record may reflect that the panel has returned. I assume we are all present and accounted for?

BAILIFF: Yes.

THE COURT: And the defendant is present.

Where's the jury list?

(Discussion off the record)

(In chambers)

THE COURT: Proceed.

MS. WELLS: Your Honor, at this time, the defendant would move to quash the jury as it is presently composed. The reason for that is that as his fourth preemptory challenge, the State, Mr. Bown specifically, chose to strike the only minority member on the jury venier. I think there is -- I know there is -- I don't have it with me -- a Utah case decided probably within the last two years dealing specifically with a deputy Salt Lake County Attorney, Mr. Walsh, who likewise struck a minority member. I know now. It was State v. Cantu (phonetic).

In that case, the Supreme Court remanded the matter back to the trial court for a hearing as to what explanation the prosecutor would be prepared to

give and to determine whether it was sufficient to find that the exercise of the challenge of a minority member was based upon any type of rational or objective criteria.

The obvious problem here is that the research and testimony that have been given and taken and accepted by other courts, including appellate courts, is that minority members are more likely than other members of the citizenry to vote for acquittal. And that the State cannot be allowed to exercise preemptory challenges to eliminate those persons from the fair cross section of the jury venier unless there is some reason that can be pointed to. And my notes indicate that Mr. -- I think it's Phung, P-h-u-n-g, who was Prospective Juror No. 6, did not answer any questions in a manner that would indicate that he could not be a fair and objective juror.

THE COURT: Mr. Bown.

MR. BOWN: Well, your Honor, the way I pick a jury, is I pick the ones that I would like on the jury. And I've gone through each of those, and if I have a question, I write a question mark. If I, for various reasons, including that a person is young and single and I don't think has the experience to understand, as well as someone older, frankly. I have

gone through the ones that I have, and I had -- actually, I had five -- a couple that I had marked off initially, and then only five people I had a question about, whether I wanted them on the jury or not. The rest were acceptable to me.

One of those was Linda Miller, I had question about. That was then struck off by defense counsel on their Number 2. So that left me with -- I had no question about everybody except four people.

It's my practice, simply, if I have any question -- it's more of a gut reaction than anything. It has nothing to do with his -- in fact, I didn't even know about a study that says they are more likely to be -- I think perhaps he has been around long enough, and perhaps I can speculate. He's been through enough, having come from Vietnam, that I think that the study would be different with Mr. Phung.

But he was just one I had a question about initially, and so he ended up being the one that I -- I had to take someone off, and I took him. It was not directed at him as a minority.

I think also in this case, it may be relevant that this defendant is not a minority.

MS. WELLS: I think it's been determined that it matters not if the defendant is of a minority

race, him or herself, but rather what the relative proneness may be of minority versus other members to vote for guilt or acquittal.

Your Honor, I know that that case is probably about two years old. I think we could find it very quickly, State v. Cantu, and I would ask the Court to look at that case before making a decision. I didn't anticipate this, so I don't have any copy of it with me.

THE COURT: Well, if you want to try to find it here briefly, you can.

(Discussion off the record)

THE COURT: The Court denies the motion to quash the panel, first, on the basis that the issue was not timely raised. It wasn't raised until after the rest of the panel was excused. And had it been raised earlier, the Court could have examined the panel and examined the prosecutor to determine whether or not there was a discriminatory purpose or motive involved. And, moreover, the Utah case discusses the case of Badson (phonetic), a United States Supreme Court case, indicating the burden is upon the defendant to show that he's a member of a cognizable racial group.

MS. WELLS: Excuse me, your Honor. I

think what the case says is that Badson is no longer applicable. I think it says that Badson used to be the rule, but now we are saying that no.

THE COURT: I'm not sure that I see that language. They go through and talk about each factor of the Badson Test.

MS. WELLS: Well, the head notes, I looked at them, indicate that the trial court is required to examine the record to determine if all the facts and circumstances of the voir dire and the subsequent striking raise any inference that the prosecution would have used the challenges in any type of discriminatory manner.

I think what that says is that the court is required to look and see if there are any objective reasons why this person should have been stricken as opposed to another person with equally innocuous types of answers. It says, "That a single challenge to a jury, based upon race, is impermissable under the 14th Amendment." And I see nothing in the head notes specifically that deals with whether or not the defendant, as Utah Courts interpret it, must be of a minority race.

In fact, it is my clear recollection that even if this case does not specifically say it,

that there are numerous cases which indicate that the defendant need not be a minority member himself in order to assert this on his behalf.

If I may respond to the timely raised, that all happened very quickly. The striking by Mr. Bown of this particular prospective juror was his fourth preemptory challenge. I felt that it would be improper to call the Court's attention, or anyone else in the courtroom, attention to this fact until the entire jury selection had been completed. And I chose to do that before any jurors were sworn. But I suggest that it would have been awkward and suggestive after having exercised those challenges for the Court then to undertake to have this type of hearing or to further expand the jury selection at that time.

So with appropriate respect, I don't believe that I raised that in an untimely fashion, and would indicate that it was only a matter of maybe one to two minutes after the exercise of the challenge was made until I called the Court's attention to it.

THE COURT: The Court simply observes that as the preemptories are being exercised, they are stricken one by the prosecutor and then one by the defendant. Then that list of prospective jurors goes back and forth. And when the fourth one is struck by

the prosecutor, it comes back to defense counsel with still one more to take. And so you've got that time while you are selecting your fourth one to observe that that's been done. And the bailiff passes it back and forth each time so that you can check each one. I have had that issue raised before, and have had counsel ask to approach the bench and ask the Court to inquire as to the reasons for it.

The Badson case did talk about the burdens being upon defendant, and to show some basis for discrimination. Does the defendant in this case claim that he is part of a cognizable racial group?

THE DEFENDANT: I don't know what that is.

MS. WELLS: He is a member of the white race, your Honor. However, it is our position that he need not himself be a member of a minority race in order to have standing to challenge the striking of a minority member for the reasons that I've already stated.

THE COURT: Anything else?

If it is raised at the time before the rest of the panel is excused, it gives the Court an opportunity to pursue that issue, do it in chambers and outside the hearing of the panel, and go through

it before the -- you have to start over selecting a new jury.

So principally on the basis of timeliness, as well as I think the burdens seem to be indicated to be upon the defendant to show that he is of a recognizable minority group, the Court concludes that the motion ought to be denied.

(In open court.)

THE COURT: Would you stand and raise your right hand?

(Jury sworn & Preliminary Instructions Read)

MS. WELLS: Your Honor, I would at this time invoke the Exclusionary Rule as to all the potential witnesses, and ask the Court to admonish them as to the meaning of that rule.

MR. BOWN: I have four witnesses here, who are witnesses.

THE COURT: Would you all come forward and be sworn?

(Prospective Witnesses Sworn.)

THE COURT: You are all to go out in the hall, and remain until you are called. You are not to talk to each other about the case. You are not to permit anybody else to talk to you about the case. If someone approaches you and tries to talk about the

APPENDIX 2

MS. WELLS: All right. Thank you.

THE COURT: May this witness be excused?

MR. BOWN: I would so move.

THE COURT: You may be excused. Thank you.

You may call your next witness.

~~GRANT HODSON~~, called as a witness on behalf of the State, after having been duly sworn, testified as follows:

~~DIRECT EXAMINATION~~

BY MR. BOWN:

Q. Would you state your name, please?

A. Grant Hodson.

Q. Spell your last name.

A. H-o-d-s-o-n.

Q. And do you have any relationship with the address of 2800 South Adams in South Salt Lake?

A. Yes, I'm the landlord.

Q. You own the building?

A. I'm buying it from Construction Realty from Don Christiansen, who, in turn, has a mortgage with Deseret Federal.

Q. How long have you been buying that?

A. Three years.

Q. What kind of a building is it?

A. It's a little over ten years old, twenty-four units. It's attractive.

Q. In November of 1988 -- what was your occupancy just prior to the fire?

A. It wasn't very good before or after the fire. It was worse after the fire. But it was about 55, 60 percent occupancy prior to the fire, and about 40 percent after.

MS. WELLS: Objection to after. It's not relevant.

THE COURT: Sustained.

MR. BOWN: Well -- okay.

As a result of the -- are you aware of a fire at that building on or about the 16th of November?

A. Yes, I am.

Q. What kind of repairs were done -- what condition is that building in today?

MS. WELLS: Objection, relevancy.

THE COURT: What's the relevance of it?

MR. BOWN: Your Honor, I'm -- what I'm attempting to do is show that one person who might be a suspect in the fire, this gentleman, had no reason to do that.

MS. WELLS: We are not --

MR. BOWN: Had no reason to fire -- to start a fire in his own apartment; although, he could be a suspect.

MS. WELLS: Well, I'm certainly not claiming that, or wouldn't intend on asking such questions. The relevancy as to the condition now, though, still is objectionable.

THE COURT: Sustained.

MR. BOWN: Did you sustain any losses as a result of the fire?

MS. WELLS: I will object to that, as well.

THE COURT: Sustained.

MR. BOWN: May we approach the bench, your Honor?

THE COURT: You may.

(Discussion off the record.)

MR. BOWN: Mr. Hodson, when did you first learn about the fire at your building?

A. At 5:00 a.m. on -- I think it was the morning of the 16th. It was the day of the fire, 15th or 16th of November. The manager gave me a call on the phone that morning.

Q. Have you suffered as a result of that

fire?

A. Excuse me, what?

Q. Yes or no, have you suffered as a result of that fire?

A. Yes.

Q. Did you start that fire?

A. No.

MS. WELLS: Objection, your Honor.

THE COURT: Sustained. It may be stricken. You are to disregard it.

MS. WELLS: And your Honor --

MR. BOWN: I have no further questions.

MS. WELLS: -- I think I need to make a motion outside the presence of the jury.

THE COURT: You may.

We will be recess for five minutes.

The jury is admonished not to talk to each other, not to talk to anyone, not to form or express any opinions.

We will meet counsel in chambers.

(Recess)

(In chambers)

MS. WELLS: Your Honor, defense would move for a mistrial. Immediately before the last question asked by the prosecutor, we approached the

bench at the defense's request --

MR. BOWN: At my request.

MS. WELLS: I am sorry. I think it was mine.

MR. BOWN: It was mine.

MS. WELLS: But either way --

THE COURT: At the prosecutor's request.

MS. WELLS: Either way, a conference at side bar off the record was that I was objecting to the relevancy of asking any questions of Mr. Hodson, the landlord, that would eliminate him as a suspect in the case. And I also objected to any questions concerning whether or not he would have suffered any particular loss in this fire beyond the obvious, that he would have as a landlord.

I believe that the Court agreed with me, that it would be improper for the prosecution to go any further beyond the general question of, "Did you suffer a loss?"

Counsel's next immediate question was, "Did you start the fire?", to which the witness responded, "No." That question and the elicited response were clearly contrary to the Court's ruling at the bench, and serve to prejudice this defendant as the prosecution attempted to eliminate other possible

suspects.

I further indicated at the bench I had no intention of indicating the landlord in any way was responsible, and wasn't intending to argue that. And I believe the prosecutor went directly against the Court's order and asked an ultimate and improper question.

MR. BOWN: Each and every time there's a theft or a crime where more than one person could have committed it, I submit it is relevant. And it's asked routinely about -- with people, "Did you commit it?" And I think that's -- that is relevant. I can't see any -- the Court sustaining the objection. I can't see that there's any prejudice to the defendant.

If they are arguing that -- I assume, reasonable doubt, the only way reasonable doubt can enter into it is if someone -- that if, in fact, the jury finds that it was an arson, that someone had to set that. It has to be a person. And for the defendant to say, "Well, there's a reasonable doubt," the only way that there can be a reasonable doubt is if there's a possibility, a likelihood, a reasonable doubt based upon the fact that someone else set that fire.

And very frankly, as I analyze the

facts, the persons who are -- to whom blame can be attached are the landlord, with potential insurance fraud in a fire, set fire of an apartment; Barbara Lee, it's her apartment and the defendant; or someone clear out of the blue. I'm attempting to eliminate the doubt that would enter into if that evidence is not involved in the case.

MS. WELLS: Your Honor, that's not the issue. The Court made a ruling at the bench, and counsel disregarded the Court's ruling, and asked the question, anyway.

THE COURT: The Court will deny the motion for mistrial.

It's relevant, but my conclusion was that he wasn't charged, he wasn't a suspect and there wasn't anything in the record to suggest it. And I thought it unnecessary, and so indicated that I didn't think it was appropriate under the circumstances.

I granted the -- sustained the objection, admonished the jury -- indicated it was stricken, and admonished them to ignore it. And based upon that, I'll deny the motion for a mistrial.

MS. WELLS: I would ask counsel to indicate if he intends to ask -- he did not ask that question of Barbara Lee.

MR. BOWN: That's true. I didn't think about that issue until this morning as I was doing my closing.

MS. WELLS: Is there any attempt to elicit that information from anybody else?

MR. BOWN: I think as far as with Barbara Lee, the evidence is clear that she was elsewhere with someone else, someone who said she was elsewhere.

MS. WELLS: Well, I would ask a -- that the Court order that no further --

MR. BOWN: I have no further questions of him, and that's essentially the end of my case. As soon as there's cross-examination, it will be over.

MS. WELLS: Because we have a record and side-bar conferences are not placed on the record, would the Court clarify that you did, in fact, make a ruling that that solicitation of testimony was irrelevant and that the objection was sustained?

THE COURT: Under the circumstances, it was appropriate since the landlord hadn't been charged, and there may be any number of people that might be suspects. And under the circumstances, I didn't think it was material to the case, and so indicated that would be my ruling.

MR. BOWN: I apologize, your Honor. It was -- in my mind, that question was not precluded. It was -- you know, I can't tell you the process that I went through. But as I asked the question, I thought it was -- it was not precluded by the side bar.

THE COURT: There was an earlier reservation of an exception. If that's convenient, we will make that on the record.

MS. WELLS: It was my renewed motion in limine, where Ms. Bateman was not able to indicate when or where -- when, particularly, the conversation took place about alleged bombing of a car, and that that would have been outside the Court's earlier ruling with regard to what the prosecutor could go into.

THE COURT: The Court overruled the objection. The information the Court had earlier was that there was a statement against interest about flaming her house, or apartment, and her statements were inconsistent, apparently, with the statements which she made to the fire investigator. And because the prosecutor was -- it was apparent he was caught by surprise, I allowed him to pursue those subjects.

MR. BOWN: And I still do have a witness

ADDENDUM

United States Constitution, Amendment 6

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

United States Constitution, Amendment 14 section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution Article I section 7

> No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution Article I section 12

> In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Utah Constitution Article I section 24

> All laws of a general nature shall have uniform operation.

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Utah Code Ann. section 76-6-1Ø3

> (1) A person is guilty of aggravated

arson if by means of fire or explosives he intentionally and unlawfully damages:

(a) a habitable structure; or

(b) any structure or vehicle

when any person not a participant in the offense is in the structure or vehicle.

(2) Aggravated arson is a felony of the first degree.

Utah Code Ann. section 78-46-2

It is the policy of this state that persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this act to be considered for jury service and have the obligation to serve as jurors when summoned for that purpose.

Utah Code Ann. section 78-46-3

A citizen shall not be excluded or exempt from jury service on account of race, color, religion, sex, national origin, or economic status.

Utah Code Ann. section 78-46-16

(1) Within seven days after the moving party discovered, or by the exercise of diligence could have discovered the grounds therefore, and in any event before the trial jury is sworn to try the case, a party may move to stay the proceedings or to quash an indictment, or for other appropriate relief, on the ground of substantial failure to comply with this act in selecting a grand or trial jury.

(2) Upon motion filed under this section containing a sworn statement of acts which if true would constitute a substantial failure to comply with this act, the moving party may present testimony of the county clerk, the clerk of the court, any relevant records and papers not public or otherwise available used by the jury commission or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand

or a trial jury there has been a substantial failure to comply with this act and it appears that actual and substantial injustice and prejudice has resulted or will result to a party in consequence of the failure, the court shall stay the proceedings pending the selection of the jury in conformity with this act, quash an indictment, or grant other appropriate relief.

(3) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the state, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this act.

Rule of Professional Conduct 3.4

A lawyer shall not ... (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;... (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence,...".

Rule of Professional Conduct 3.8

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.

Utah Rule of Evidence 4Ø3

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.nd discretion of the trial court.